98-208

Supreme Court, U.S.
FILED
JAN 20 1999
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,
Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

CROSS WROCK, P.C.
Michael J. Connolly
(Counsel of Record)
David A. Lawrence
400 Renaissance Center
Suite 1900
Detroit, MI 48243
(313) 259-1144

Clifford J. Scharman
1742 N Street, N.W.
Washington, D.C. 20036
(202) 331-0660

Date: January 20, 1999

Casillas Press • 1717 K Street, N.W. • Washington, D.C. 20036 • (202) 223-1220

37pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

INTERESTS OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT PUNITIVE DAMAGES MAY BE AWARDED ONLY IF THE INTENTIONAL DISCRIMINATORY CONDUCT WAS EGREGIOUS 5

A. Congress Intended A "Two-Tiered" Structure For An Award of Compensatory and Punitive Damages 5

B. The Legislative History of Section 1981a . . 10

1. The 1990 Civil Rights Restoration Act 11

2. The 1991 Civil Rights Act 13

C. *Smith v. Wade* And Its Progeny -- Defining The Malice Or Reckless Indifference Standard 14

D. Courts of Appeals Decisions Under Section 1981 18

E. The Clear Majority Of Circuit Courts Applying Section 1981a Under Title VII Require "Egregious" Or "Outrageous" Conduct 19

F. Policy Considerations Support The Congressional Intent to Reserve Punitive Damages To Cases with Egregious Conduct 21
1. Punitive Damages for Non-egregious Conduct Can Result in Over-deterrence and Quasi-quotas 21
2. Petitioner's Lower Standard for Imposing Punitive Damages Will Lead to Unnecessary Litigation 24
3. Because Existing Economic Sanctions Are a Sufficient Deterrent Against Discrimination, Punitive Damages Should Be Reserved for Egregious Discrimination 25

II. THE SUFFICIENCY OF THE EVIDENCE TO JUSTIFY PUNITIVE DAMAGES IS A QUESTION OF LAW IN THE FIRST INSTANCE 28

CONCLUSION 30

TABLE OF CASES

Cases: Page

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 24
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 28
Beauford v. Sisters of Mercy - Province of Detroit, 816 F.2d 1104 (6th Cir. 1987) 18
BMW of North America v. Gore, 517 U.S. 559 (1996) 1, 17, 22
Carey v. Piphus, 435 U.S. 247 (1978) 15
City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) 1
Coleman v. Rahija, 114 F.3d 778 (8th Cir. 1997) 17
Commissioner v. Estate of Bosch, 387 U.S. 456 (1967) 9
Conroy v. Aniskoff, 507 U.S. 511 (1993) 7
Cornell v. Woods, 69 F.3d 1383 (8th Cir. 1995) 17
EEOC v. Wal-Mart Stores, Inc., 156 F.3d 989 (9th Cir. 1998) 21
Emmel v. Coca-Cola Bottling Co., 95 F.3d 627 (7th Cir. 1996) 20, 27
Farpella-Crosby v. Horizon Health Care, 97 F.3d 803 (5th Cir. 1996) 19
Fitzgerald v. Mountain States Tel. and Tel. Co., 68 F.3d 1257 (10th Cir. 1995) 21, 29
Gustafson v. Alloyd Co., 513 U.S. 561 (1995) 7
Harris v. L & L Wings, 132 F.3d 978 (4th Cir. 1997) 26
Helvering v. Hammel, 311 U.S. 504 (1941) 8
Hennessy v. Penril Datacomm, 69 F.3d 1344 (7th Cir. 1995) 26

Hernandez-Tirado v. Artau,
874 F.2d 866 (1st Cir. 1989) 17, 19
Hetzel v. Prince William County,
523 U.S. 208 (1998) 29
Honda Motor Co. v. Oberg,
512 U.S. 415 (1994) 30
Ingels v. Thiokol Corp.,
42 F.3d 616 (10th Cir. 1994) 22
Ivey v. Wilson,
832 F.2d 950 (6th Cir. 1987) 17
Jackson v. Pool Mortgage Co.,
858 F.2d 1178 (10th Cir. 1989) 18
Karcher v. Emerson Electric Co.,
94 F.3d 502 (8th Cir. 1996) 20, 29
Kolstad v. American Dental Association,
108 F.3d 1431 (D.C. Cir. 1997) 3
Kolstad v. American Dental Assocation,
912 F. Supp. 13 (D.D.C. 1996) 26
Kolstad v. American Dental Association,
139 F.3d 958 (D.C. Cir. 1998) . . . . . *passim*
Kelly v. Robinson, 479 U.S. 36 (1986) 6
Kimzey v. Wal Mart Stores, Inc.,
107 F.3d 568 (8th Cir. 1997) 27
Lam v. Curators of the University of Missouri,
122 F.3d 654 (8th Cir. 1997) 28
Landgraf v. USI Film Products,
511 U.S. 244 (1994) 10, 11
Lowery v. Circuit City Stores,158 F.3d 742
(4th Cir. 1998), *petition for cert. filed*,
67 U.S.L.W. 3409 (U.S. Jan. 5, 1999)
(No. 98-972) 20
Martin v. Cavalier Hotel Corp.,
48 F.3d 1343 (4th Cir. 1995) 27
Mastro Plastics Corp. v. NLRB,
350 U.S. 270 (1956) 7

McKinnon v. Kwong Wah Restaurant,
83 F.3d 498 (1st Cir. 1996) 19
Memphis Community School District v. Stachura,
477 U.S. 299 (1986) 16
Merrill, Lynch, Pierce, Fenner & Smith, Inc. v.
Lauer, 49 F.3d 323 (7th Cir. 1995) 10
Miller v. Johnson, 515 U.S. 900 (1995) . . . . . .
Moskal v. United States, 498 U.S. 103 (1990) 6
Neely v. Martin K. Eby Constr. Co.,
386 U.S. 317 (1967) 29
Ngo v. Reno Hilton Resort Corp., 140 F.3d 1299
(9th Cir. 1998), *modified* 156 F.3d 988, *petition*
for cert. filed, 67 U.S.L.W. 3407
(U.S. Dec. 18, 1998) (No. 98-999) 20
Norfolk Redevelopment and Housing Authority v.
C & P Telephone Co., 464 U.S. 30 (1983) 5
Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 19, 24
Quaratino v. Tiffany & Co.,
129 F.3d 702 (2d Cir. 1997) 27
Robinson v. Shell Oil Company,
519 U.S. 337 (1997) 8
Rowlett v. Anheuser-Busch, Inc.,
832 F.2d 194 (1st Cir. 1987) 18, 19
Smith v. Wade, 461 U.S. 30 (1983) . . . 14, 15, 16, 17
St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993) 1, 22
Stephens v. South Atlantic Canners,
848 F.2d 484 (4th Cir. 1988) 18
The Philadelphia, Wilmington, Baltimore R.R. Co.
v. Quigley, 62 U.S. 202 (1858) 16
Tincher v. Wal-Mart,
118 F.3d 1125 (7th Cir. 1997) 29
Touche Ross & Co. v. Redington,
442 U.S. 560 (1979) 6

United States v. Alaska,
117 S. Ct. 1888 (1997) 8
U.S. National Bank of Oregon v. Independent Insurance Agents of America,
508 U.S. 439 (1993) 7
Turic v. Holland Hospitality, Inc.,
85 F.3d 1211 (6th Cir. 1996) 20
Walters v. City of Atlanta,
803 F.2d 1135 (11th Cir. 1986) 18
Wolfel v. Bates,
707 F.2d 932, 934 (6th Cir. 1983) 17
Wulf v. City of Wichita,
883 F.2d 842 (10th Cir. 1989) 29
Yarbrough v. Tower Oldsmobile, Inc.,
789 F.2d 508, 514 (7th Cir. 1986) 18

Statutes:

Civil Rights Act of 1991, Pub. L. No. 102-166,
§ 101, 105 Stat. 1071 19
42 U.S.C. § 1981 . . . . . 12, 13
42 U.S.C. § 1981a . . . . . *passim*
42 U.S.C. § 1981a(a)(1) 5
42 U.S.C. § 1981a(b)(1) 5, 6
42 U.S.C. § 2000e-2(e) 9
42 U.S.C. § 2000e(j) 9
42 U.S.C. § 2000e(f) 9

Legislative Materials:

1990 Civil Rights Restoration Act,
S. 2106, 101st Cong., 2d Sess. (1991) 11
H.R. 1, 101st Cong., 1st Sess. (1991) 13
H.R. 4000, 101st Cong., 2d Sess. (1991) 12
S. Rep. 315, 101st Cong., 2d Sess. (1990) 12

H.R. Rep. No. 40, Pt. 1, 102d Cong.,
1st Sess. (1991) 13, 15, 26
H.R. Rep. No. 644, Pt. 1,
101st Cong., 2d Sess. (1990) 12
136 Cong. Rec. S16418 (Oct. 22, 1990) 11
137 Cong. Rec. S15743 (Oct. 30, 1991) 14

MISCELLANEOUS:

11 Employment Discrimination Report (BNA)
No. 8 (Aug. 19, 1998) 24-25
Fed. R. Civ. P. 50(a)(1) 28
Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795 (1992) . . . 16
Schlueter and Redden, *Punitive Damages*,
(3d ed. 1995) 16
2A Sutherland Statutory Construction (5th ed.) 11
W. Page Keeton, et al., *Prosser and Keeton on The Law of Torts*, (5th ed. 1984) 7

BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] While WLF engages in litigation and the administrative process in a variety of areas of the law, WLF devotes a substantial portion of its resources to cases raising civil rights issues. In this regard, WLF has appeared as amicus curiae in numerous civil rights cases before this Court. *See, e.g.*, *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). WLF has also appeared as amicus in punitive damages cases before this Court. *See, e.g.*, *BMW of North America v. Gore*, 517 U.S. 559 (1996). WLF's Legal Studies Division also publishes monographs and other publications on these and other pertinent issues, such as Title VII of the Civil Rights Act of 1964.

WLF believes that it can present a broader perspective to this case than the parties, and that its participation as an amicus will assist the Court in resolving the issue before it.

---

[1] Pursuant to Supreme Court Rule 37.6, amicus represents that no counsel for either party authored this brief either in whole or part. Furthermore, no persons or entities, other than amicus curiae, its supporters, or counsel, contributed financially to the preparation or submission of this brief. This brief is being filed with the written consents of all the parties which have been filed with the Clerk.

STATEMENT OF THE CASE

In the interests of judicial economy, amicus adopts by reference the Statement of the Case as presented in the brief of the respondent. In brief, petitioner, a female employee, filed a lawsuit against her employer, respondent American Dental Association, alleging that the promotion of a male employee to the vacant position of Director of Legislation and Legislative Policy constituted sex discrimination in violation of Title VII, 42 U.S.C. §2000(e), *et seq.* She sought equitable relief, compensatory and punitive damages under 42 U.S.C. §1981a(b)(1), and attorneys' fees.

After trial, the jury awarded petitioner $52,718 in back pay on the issue of liability. *Kolstad v. American Dental Association*, 139 F.3d 958, 961 (D.C. Cir. 1998), J.A. 109-10. The district court refused to instruct the jury on punitive damages; denied respondent's motion for judgment as a matter of law on the issue of liability; and held that petitioner was not entitled to instatement to the position. *Id.* at 960-61. The district court also denied petitioner's request for her attorneys' fees.

The trial judge held that he would have set the jury verdict aside, pursuant to Fed.R.Civ.P. 50(c), if it was within his power to do so. *Kolstad*, 912 F.Supp. 13, 14-15 (D.D.C. 1996). He observed that all of respondent's officials, both male and female alike, who had knowledge of the job duties and the two candidates, testified that the male candidate was better qualified for the job. "For aught that appears in this record their genders might have been reversed, or they of the same sex. That one was male and one was female is a mere fortuity." *Id.* at 14.

A divided panel of the U.S. Court of Appeals for District of Columbia Circuit reversed the dismissal of the

punitive damages claim and remanded on both the punitive damages and attorneys' fees issues. *Kolstad,* 108 F.3d 1431, 1437-39 (D.C. Cir. 1997). The court of appeals granted *en banc* review and reversed the panel decision with respect to punitive damages. The court rejected the view that punitive damages are available in Title VII in all but a narrow range of disparate treatment cases, where, in essence, the plaintiff demonstrates nothing higher than the minimal standard for imposing liability and the award of compensatory damages. *Kolstad,* 139 F.3d at 960. The court further held that the standard required for imposition of punitive damages was "egregious" conduct, but found that there was no such conduct in this case. Therefore, the court of appeals affirmed the district court's decision not to submit the issue of punitive damages to the jury.

SUMMARY OF ARGUMENT

The statutory language and structure of 42 U.S.C. § 1981a clearly establishes a two-tiered liability standard for compensatory damages (all cases of intentional discrimination) and punitive damages (a subset of intentional discrimination), which requires a plaintiff to demonstrate a higher degree of egregious discriminatory conduct on the part of the defendant. Any other construction of the statute would render §1981a(b)(1) mere surplusage, contrary to the legislative intent.

Petitioner's superficial "plain meaning" argument that "reckless" conduct is something more than negligence but less than intentional conduct, leads to an illogical or absurd conclusion: that Congress intended punitive damages to be available where the conduct does not even rise to the minimal level of intent necessary for finding liability for the award of compensatory damages. Consequently, an examination of legislative history and prior case law is

appropriate to determine the legislative intent of the punitive damages provision of § 1981a.

The legislative history and case law, under the 1866 and 1871 Civil Rights Act, 42 U.S.C. §§1981 and 1983, support the conclusion reached by the court below that the award of punitive damages requires a showing of "egregious" conduct. Comments from both sides of the legislative aisle support this standard.

Important policy conditions further support the two-tiered approach to punitive damages and the "egregious conduct" standard. Making punitive damages awards available in every garden variety lawsuit would encourage complaining parties to litigate unnecessarily rather than obtain a prompt administrative resolution of their EEOC charges. This is contrary to the purpose of Title VII which is to foster conciliation and prompt resolution of cases. Furthermore, punitive damages, which are designed to deter reprehensible conduct, cannot deter the everyday personnel decisions that must be made by employers. They presumably have some non-discriminatory rationale for making those decisions. The liberal availability of punitive damages as urged by the petitioner will lead to over-deterrence, forcing conscious or unconscious quota-like decisions by employers in the workplace, contrary to sound public policy.

The court below also correctly decided that the sufficiency of the evidence supporting a punitive damage award is a question of law, in the first instance. This aspect of the decision comports with Fed.R.Civ.P. 50 and 59.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT PUNITIVE DAMAGES MAY BE AWARDED ONLY IF THE INTENTIONAL DISCRIMINATORY CONDUCT WAS EGREGIOUS

A. Congress Intended A "Two-Tiered" Structure For An Award of Compensatory and Punitive Damages

Section 1981a(a)(1) provides that a "complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section" against an employer which engaged in "unlawful intentional discrimination." Subsection (b) provides that punitive damages may be awarded only when "the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

Petitioner argues that punitive damages may be awarded in every case where the plaintiff has satisfied her minimal burden of proving intentional discrimination because the plain meaning of "reckless indifference" allegedly is conduct that is less than intentional. This isolated reading of the punitive damages provision does violence to the overall statutory scheme, is contrary to congressional intent, against the weight of authority, and contrary to sound public policy.

The cardinal purpose of statutory construction is to determine and interpret statutes in accordance with legislative intent. *See, e.g., Norfolk Redevelopment and*

Housing Authority v. C & P Telephone Co., 464 U.S. 30, 36 (1983). Amicus EEOC acknowledges that "the ultimate question is one of Congressional intent." United States and EEOC Amici Curiae Brief at 17-18 (hereinafter EEOC Br.), *citing Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979). All of the rules of statutory construction are designed to aid the Court in ascertaining that congressional intent.[2]

Although the plain meaning of a statute may often be indicative of Congressional intent, "the Court must not be guided by a single sentence or a member of a sentence, but must look to the provisions of the whole law and to its object and policy." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) *quoting Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986). It is axiomatic that the plain meaning of a statutory provision cannot reasonably be determined by reviewing the provision in a vacuum: "Over and over we have stressed that in expounding a statute, we must not be guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and

---

[2] Petitioner and her amici's strict reliance upon the plain meaining rule ignores other applicable rules of statutory construction to determine legislative intent. For example, in *Moskal v. United States*, 498 U.S. 103 (1990), cited by petitioner (Pet. Br. at 15), the Court dismissed the petitioner's common law meaning of a statutory term, finding that it "violates the established principle that a Court should give effect, if possible, to every clause and word of a statute." *Id.* at 109-110. As amicus will further argue, *infra*, petitioner's interpretation would render the "malice or with reckless indifference" phrase of the punitive damages provisions of §1981a(b)(1) as mere surplusage, since punitive damages could be awarded in every intentional discrimination case where compensatory damages are awarded.

to its object and policy." *U.S. National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439, 455 (1993).

Courts have long followed the doctrine of *noscitur a socius* ("a word is known by the company it keeps") in determining the meaning of a word or phrase in the statute. This rule aids the Court in avoiding ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995). Statutes are not to be interpreted so as to produce incongruous results, as would occur under petitioner's construction of the punitive damages provision. *See, e.g., Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 286-87 (1956).

Moreover, it is a "fundamental principle of statutory construction . . . that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which is it used." *Deal v. U.S.*, 508 U.S. 129, 132 (1993). This principle is also acknowledged by amicus EEOC when it cites *Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993) for the proposition that, "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends upon context." EEOC Br. at 12.

The plain meaning rule cannot possibly determine congressional intent in this case as petitioner claims. Petitioner contends that in every case of intentional discrimination there is at least "reckless" conduct and, therefore, an award of punitive damages is always at the discretion of the jury. Pet. Br. at 14. In fact, the term "reckless" falls on a continuum of conduct -- more than negligent, less than intentional. W. Page Keeton, et al., *Prosser and Keeton on The Law of Torts*, § 34 (5th ed. 1984).

The fallacy of petitioner's argument is self-evident because it leads to the absurd result that punitive damages can be awarded on a lesser showing of intent than that which is the minimum necessary to impose liability for compensatory damages. *See, e.g., Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941). Congress clearly sought to require "something more" than intentional discrimination for an award of punitive damages. Otherwise, petitioner's interpretation would write out the entire damages clause of §1981a(b)(1), which was written as a modifier to §1981a(a) which requires intent to impose liability. Section 1981(a)(1) provides that a "complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section. . . ." Section 1981a(b)(1) provides that punitive damages may be awarded only when "the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

If all that is required for an award of punitive damages is a showing of intentional discrimination, there would have been no reason to enact subsection (b)(1). This violates another venerable rule of statutory construction that all parts of a statute must be harmonized to avoid an interpretation that renders some words redundant or the "broader" terminology superfluous. *See, e.g., United States v. Alaska*, 117 S.Ct. 1888, 1918 (1997); *see also Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 846 (1997) (the "plainess or ambiguity of statutory language is determined by refernce to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole"). The *Robinson* Court found that the word "employee" may have a plain meaning in one context but a different meaning in another context within the same statute. *Id.* at 847.

Using this Court's principles of statutory construction, the court below correctly determined that there is a two-tiered scheme of liability which the plaintiff must "demonstrate" in Title VII litigation for the award of both compensatory and punitive damages. Indeed, EEOC concedes that "a finding of intentional discrimination, *without more*, does not automatically make a plaintiff eligible to receive punitive damages." EEOC Br. at 9 (emphasis added).

However, the EEOC argues that in all but a very few limited circumstances, punitive damages should be submitted to the jury, thereby giving short shrift to the very same two-tiered structure of the law which EEOC agrees congress intended. The EEOC believes that punitive damages can be awarded in all cases except in the following limited circumstances: the employer acted upon a mistaken good faith belief that the trait is a *bona fide* occupational qualification ("BFOQ"), 42 U.S.C. §2000e-2(e); the employer engaged in a valid effort to remedy the effects of past discrimination; the employer is not obliged to accommodate a particular religious exercise because of undue hardship, 42 U.S.C. §2000e(j); the employee falls under the "personal staff" exception to Title VII, which exception applies only to the staff of elected public officials, 42 U.S.C. §2000e(f); or when a novel legal theory is asserted. EEOC Br. at 16. These very narrow exceptions are essentially illusory because it would make punitive damages available in almost every garden variety case of discrimination.

Where, as here, the statutory language in question is unclear, leads to illogical results, or thwarts the purpose of the Act, the Court looks to the legislative history to discern congressional intent. *See, e.g., Commissioner v. Estate of Bosch*, 387 U.S. 456, 463-64 (1967). The terms of the statute are to be interpreted in light of their historical usage

and the Courts may avail themselves of the legislative history of the statute, its antecedents, or contemporaneous legislation. *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v Lauer*, 49 F.3d 323, 327 (7th Cir. 1995). Consequently, the court below correctly examined the legislative history[3] and case law in concluding that "egregious conduct" is the necessary predicate for submitting the issue punitive damages to the jury.

B. The Legislative History of Section 1981a

If the Court believes that the legislative intent cannot be clearly discerned from the language of the punitive damages provision, the Court may properly examine the relevant legislative history to determine congressional intent.[4]

---

[3] If Congress wanted the courts to limit their search for applicable legislative history in interpreting the punitive damages provision, it could have easily done so, but chose not to do so here. *Compare* Pub. L. 102-66, §105(b), 105 Stat. 1071 (1992), where Congress expressly limited the applicable legislative history for the proper interpretation of the "*Wards Cove*" provision of that legislation, to specified portions of the Congressional Record.

[4] Amicus EEOC cites *Landgraf v. USI Film Products*, 511 U.S. 244, 262-63 (1994) as somehow standing for the proposition that the legislative history should be viewed with skepticism because of "frankly partisan statements." EEOC Br. at 27. However, the *Landgraf* decision was solely concerned with the issue of whether the right to recover compensatory and punitive damages should be made retroactive to pending cases. That contentious issue included proposals from both sides of the aisle. *Landgraf, supra*, at 262-63. Nevertheless, the *Landgraf*

1. The 1990 Civil Rights Restoration Act

The starting point for the legislative history of the 1991 Civil Rights Act is its immediate predecessor, S. 2106, 101st Cong., 2d Sess (1990), also known as the 1990 Civil Rights Restoration Act.[5] *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 261-62. The chief Democratic sponsor of this legislative proposal, Senator Edward Kennedy, stated that this statute:

> "repairs a serious gap in Federal law caused by the lack of effectiveness [*sic*] remedies for women and certain other minorities in job discrimination cases.... The Act closes these serious loopholes by granting victims of intentional sex and religious discrimination the right to recover compensatory damages *and, in particularly flagrant cases, punitive damages as well.*"

Court relied on "*[t]he relevant legislative history of the 1991 Act*" to reinforce "its conclusion that §§402(a), 109(c) and 402(b) cannot bear the weight petitioner places on them." *Id.* at 262 (emphasis added). Clearly, the proper use of legislative history is just as warranted in this case as it was in *Landgraf*.

[5] S. 2106 was enacted by both Houses of Congress but vetoed by then President Bush. 136 Cong. Rec. S 16418 (Oct. 22, 1990). Congress failed by only one vote to overrule the veto. Thus, unlike legislation that may have failed passage in either House, S. 2106 reflected the legislative wishes of both Houses. Consequently, the legislative history of the 1990 Act is helpful in discerning the intent of the immediate subsequent Congress which enacted the identical punitive damages provision of S. 2106 (albeit with a cap on the amount of damages). *See* 2A Sutherland Statutory Construction § 48.03 (5th ed.); *United States v. The Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222-23, n.6 (1952).

136 Cong. Rec. 16706 (emphasis added). Senator Kennedy continued to explain that these are the same remedies available under §1981 of the 1866 Civil Rights Act. Senator Kennedy provided the example of Patricia Swanson, which involved flagrant facts, as the kind of case that warranted these additional damage remedies.[6]

The Senate Report, S. Rep. 315, 101st Cong., 2d Sess. (1990), discusses Ms. Swanson's congressional testimony of her plight as a "tragic" case. *Id.* at 30. The circumstances included a parade of horrible allegations of continuous sexual harassment by her supervisor over a one-year period, which caused her to cry and experience serious migraine headaches. *Id.* at 30-31. The Court concluded that although she had been sexually harassed, she was terminated for unrelated reasons and could not be awarded any damages. She was ultimately found liable for the employer's court costs. *Id.* at 31. This example is precisely the type of "egregious" and "flagrant" conduct which justifies the exercise of jury discretion to award not only compensatory damages, but also punitive damages.

The House Report on H.R. 4000, the companion bill to S. 2106, is even more instructive on the Congressional intent. *See* H.R. Rep. No. 644, Pt. 1, 101st Cong., 2d Sess. (1990). In discussing the need to conform Title VII

---

[6] H.R. Rep. No. 644, Pt. 1, at 38-42, and Pt. 2, at 33-34, discussed two similarly egregious fact situations of a Ms. Brooms, Ms. Zabkowicz, and Ms. Harrington, who were also barraged by continuous, aggravated, and pronounced sexual harassment. Indeed, the Court in the *Zabkowicz* case found that she had suffered "*malevolent and outrageous harassment*", which was "*sustained, vicious, and brutal harassment.*" *Id.* at 34 (emphasis added). Thus, egregious and outrageous cases of discrimination, rather than the garden variety Title VII cases, were the target for the imposition of punitive damages.

remedies to those available under § 1981, the Majority Report stated that victims of discrimination under § 1981 are entitled "not only to equitable relief, but also compensatory damages, *and in particularly egregious cases, punitive damages as well.* *Id.* at 38 (emphasis added). This is precisely the standard adopted by the court below and numerous other courts of appeals.

2. The 1991 Civil Rights Act

On April 24, 1991, Representative Ford, one of the chief Democratic sponsors of H.R.1,[7] submitted the Committee on Education and Labor Report, H.R. Rep. 40, Pt. 1, 102d Cong., 1st Sess. (1991). The Report found the need to conform the federal remedies for race and gender discrimination. *Id.* at 65. The Committee Report noted that "*in particularly egregious cases*" (emphasis added), punitive damages are available under § 1981. *Id.* The Committee Report further notes that "[b]y contrast, victims of intentional gender or religious discrimination may receive under Title VII injunctive relief, reinstatement or hiring, and up to two years' backpay, *but the statute does not permit awards of compensatory or punitive damages no matter how egregious the circumstances of their case.*" *Id.* (emphasis added). Once again, the legislative history supports the court of appeal's conclusion that punitive damages would be an available tool only in "egregious cases."

The legislative language of "malice or reckless indifference" was admittedly derived from case law that

---

[7] H.R. 1, the initial version of the 1991 Civil Rights Act, like the failed 1990 Civil Rights Restoration Act, contained no statutory cap for compensatory or punitive damages.

developed under § 1981 and set forth in this Court's decision in *Smith v. Wade*. 461 U.S. 30 (1983). *Id.* at 74. But there is no inherent conflict between the Majority Report's stated purpose of the legislation -- to allow punitive damages in egregious cases -- and the legislative language used, as suggested by petitioner and her amici. The intent is clear: punitive damages are to be awarded only in egregious cases.

Amicus further refers this Court to the discussion of the legislative history by the court below. *Kolstad*, 139 F.3d at 962-63. That record reveals statements made on both sides of the aisle, after the hastily reached compromise, which support the "heavy burden" that must be met to warrant an award of punitive damages (Senator Bumpers' statement). 137 Cong. Rec. S15479 (Oct. 30, 1991); *see also* 137 Cong. Rec. S 15743 (Oct. 30, 1991) (Interp. Memo of Senator Dole, *et al.*) (punitive damages would be available in "extraordinarily egregious cases.")

Thus, the legislative record from both sides of the aisle contains references to the terms "flagrant" and "egregious" and discusses cases which reflect outrageous conduct, not the kind of garden variety discrimination that was found to have occurred in this case. This legislative history thus supports the court of appeal's holding that a heightened "egregious" standard for an award of punitive damages is required.

C. *Smith v. Wade* And Its Progeny -- Defining The Malice Or Reckless Indifference Standard

The genesis of punitive damages awards in civil rights litigation can be found in this Court's 5-4 decision in *Smith*

v. Wade, 461 U.S. 30 (1983).[8] In that case, this Court, approved an award of punitive damages in a claim under 42 U.S.C. § 1983. In *Smith*, the jury was instructed that punitive damages might be awarded for "an egregious failure to protect Wade (defined as a flagrant or remarkably bad failure to protect)." *Id.* at 33.

The facts of the case demonstrated flagrant and egregious misconduct by the defendant, a prison guard, for failing to protect a youthful first offender prisoner from "physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities." *Id.* at 32. The guard placed a third inmate (who was in the particular unit because of prior fighting) into plaintiff's two-person jail cell, even though the plaintiff had been victimized by prior acts of violence. The Court adopted the following punitive damages standard: "evil motive or intent, or when it involves reckless or callous indifference. . . ." *Id.* at 56.

As the court of appeals noted, the *Smith* majority made clear that "deterrence of future *egregious* conduct is a primary purpose . . . of punitive damages." *Id.* at 49. This decision was the predicate for numerous decisions affirming punitive damages and also the statutory language. *See* H.R. Rep. No. 40, Pt. 1, at 74 (1991).

In his cogent dissent in *Smith v. Wade*, then Associate Justice William Rehnquist thoroughly examined the history and purposes of punitive damages, which are imposed as punishment and intended to serve as a deterrent. *Smith*, 461 U.S. at 58-59. These quasi-criminal penalties,

---

[8] In *Carey v. Piphus*, 435 U.S. 247 (1978), this Court refused to rule on whether punitive damages were available under §1983 because the district court found that the defendants did not act with "malicious intent" to deprive rights. *Id.* at 257, n.11.

however, are unaccompanied by the procedural safeguards available in the criminal process; they are also subject to the "caprice and prejudice of jurors" which may be used to punish unpopular defendants rather than focusing on the conduct. *Id.* at 59. *See also* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795, 1816-23 (1992); Schlueter and Redden, *Punitive Damages*, § 2.2(A)(2) (3d ed. 1995). Justice Rehnquist further observed that any value of deterrence would likely be outweighed by the encouragement of unnecessary litigation. *Smith*, *supra*, 461 U.S. at 59.[9] The *Smith* dissent further reviewed case law cited by the majority and found that it supported the notion that the reckless indifference standard is grounded on a willful and malicious "spirit of mischief or criminal indifference" standard. *Id.* at 74. *See also The Philadelphia, Wilmington, Baltimore R.R. Co. v. Quigley*, 62 U.S. 202, 214 (1859). Consequently, punitive damages should only be available upon a showing of the "requisite intent" (malice or wanton or oppressively done). *See, e.g., Memphis Community School District v. Stachura*, 477 U.S. 299, 306, n.9 (1986).

While amicus believes that the dissent had the better of the argument in *Smith v. Wade,* the conduct at issue in that case was nevertheless egregious and outrageous, even if the expressed standard was "reckless or callous indifference." As noted by the court below, the case law in the aftermath of *Smith* is split on whether the standard to impose for intentional discrimination is sufficient, without more, to

---

[9] *See* related discussion by amicus of this "unnecessary litigation" argument in the context of Title VII cases, *infra*, at 24.

support an award of punitive damages. *Kolstad*, 139 F.3d at 963-66.

In applying the *Smith v. Wade* standard to a Section 1983 case where the plaintiff asserted that a demotion was politically motivated, then Circuit Judge Stephen Breyer held:

> Thus, neither the common law, nor the Supreme Court in *Smith*, allows a jury to assess punitive damages in every single instance where it finds an intentional tort; *rather, they require conduct that is "outrageous,"* either because of a person's "evil motive" or because of his "reckless indifference" to the rights of others.

Hernandez-Tirado v. Artau, 874 F.2d 866, 869 (1st Cir. 1989) (emphasis added). *See also Ivey v. Wilson*, 832 F.2d 950, 956 (6th Cir. 1987) (requiring a showing of "ill will" or "bad faith"); *Coleman v. Rahija*, 114 F.3d 778, 788 (8th Cir. 1997) (focus on intent of defendant and reverses award of punitive damages because the conduct was not sufficiently "egregious"); *Cornell v. Woods*, 69 F.3d 1383, 1391 (8th Cir. 1995) (conduct did not rise to the "level of egregiousness"); *Wolfel v. Bates*, 707 F.2d 932, 934 (6th Cir. 1983).

The egregious standard is not surprising, in view of the purposes of punitive damages. As this Court recently held in *BMW of North America v. Gore*, 116 U.S. 559 (1996), the reasonableness of a punitive damage award for constitutional purposes must be based on the "*degree of reprehensibility* of the defendant's conduct. As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect "the enormity of his offense. [citations omitted]. This principle reflects the accepted view that some wrongs are more blameworthy than others." *Id.* at 568.

Thus, for purposes of determining the constitutionality of excessive punitive damages, courts must examine the degree of wrongdoing; the flagrancy or egregiousness of the conduct; and the illicit motive of the actor. Amicus submits that these are the terms used throughout the legislative history of the 1991 Civil Rights Act; comports with the common law principles which support an award of punitive damages; and more accurately reflect the legislative intent in the enactment of the new punitive damages provision.

D. Courts of Appeals Decisions Under Section 1981

As the court below noted, numerous other courts of appeals have held that under §1981, punitive damages are awarded to punish or deter "particularly egregious" conduct. *Stephens v. South Atlantic Canners*, 848 F.2d 484, 489-90 (4th Cir. 1988) (not every lawsuit calls for submission of this extraordinary remedy to the jury); *Beauford v. Sisters of Mercy - Province of Detroit*, 816 F.2d 1104, 1109 (6th Cir. 1987) (requires evidence of egregious conduct, willfulness or malice and, therefore, affirmed district court's refusal to submit punitive damage award to a jury in a promotion discrimination case);[10] *Walters v. City of Atlanta*, 803 F.2d 1135, 1147 (11th Cir. 1986) (requires "ill will" in refusal to hire case and reverses jury award of punitive damages); *Yarbrough v. Tower Oldsmobile, inc.*, 789 F.2d 508, 514 (7th Cir. 1986) (purpose of punitive damages is to punish "outrageous"

[10] The *Beuford* case is particularly noteworthy because it was one of the cases cited in the legislative history of the 1991 Civil Rights Act. *See Kolstad*, 139 F.3d at 963. ***But see Rowlett v. Anheuser-Busch, Inc.***, 832 F.2d 194, 205 (1st Cir. 1987).

conduct); *Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1182 (10th Cir. 1989)(requiring "personal animosity" toward plaintiff).

Thus, at the time Congress enacted § 1981a, the majority of courts applying the "reckless indifference" standard, under § 1981, required proof of egregious, outrageous, or other high level spite or ill-will.[11]

E. The Clear Majority Of Circuit Courts Applying Section 1981a Under Title VII Require "Egregious" Or "Outrageous" Conduct

Seven other circuit courts of appeals -- the First, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth -- have all joined the District of Columbia Circuit in adopting the heightened two-tiered standard of liability.[12] In *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 508 (1st Cir. 1996), the Court relying on then Judge Breyer's decision in *Hernandez-Tirado, supra*, and *Rowlett, supra*, held that

[11] This Court made the issue of punitive damages under §1981 litigation largely moot in its decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Racial discrimination claims were relegated for the most part (hiring decision excluded) to the equitable remedies that then existed under Title VII. The issue is once again relevant in § 1981 litigation, because Section 101 of Pub. L. 102-166, 105 Stat. 1071, overturned *Patterson*.

[12] The Fifth Circuit has implicitly adopted the two-tiered standard when it concluded that no reasonable juror could find the requisite malice or reckless indifference in a case in which the court simultaneously affirmed the award of compensatory damages. *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 809-10 (5th Cir. 1996).

punitive damages are necessary to punish [the defendant] for his *outrageous conduct* and deter him from similar conduct in the future. 83 F.3d at 508.

In *Lowery v. Circuit City Stores*, 158 F.3d 742 (4th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3409 (U.S. Jan. 5, 1999) (No. 98-972), a combined § 1981 and Title VII action, the court held that punitive damages are an "extraordinary remedy, designed to punish and deter *particularly egregious* conduct." *Id.* at 766 (emphasis added). In *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6th Cir. 1996), the Court applied a two-tiered standard of proof under the malice and reckless indifference standard.

In *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627 (7th Cir. 1996), the court applied the same higher hurdle in a sexual harassment suit. In discussing the malice and reckless disregard standard, the Court held: "This is a higher hurdle than merely proving the underlying unlawful discrimination. And having gotten over this additional element of proof, the amount of punitive damages to which a plaintiff is entitled is determined by *the degree of egregiousness* of the underling 'malice or reckless indifference.'" *Id.* at 636 (emphasis added). *See also Tincher v. Wal-Mart*, 118 F.3d 1125, 1132-34 (7th Cir. 1997)

In *Karcher v. Emerson Electric Co.*, 94 F.3d 502 (8th Cir. 1996), the court, in affirming an award of compensatory damages while reversing on punitive damages, applied the malice or reckless indifference standard, as though there was a two-tiered system. The court held, in circumstances more egregious than petitioner's allegations in this case (job qualifications designed to eliminate all women from promotion and subsequent retaliation), that there was insufficient evidence

of "malice or *deliberate* indifference or that its conduct was *outrageous*." *Id.* at 509 (emphasis added).

In *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299 (9th Cir. 1998), *modified* 156 F.3d 988, *petition for cert. filed*, 67 U.S.L.W. 3407 (U.S. Dec. 18, 1998) (No. 98-999), the Ninth Circuit held that defendant's conduct, while negligent "and perhaps even recklessly . . ." did not "evince an *evil motive* or a *conscious and deliberate* disregard" of the employee's Title VII rights. The court reversed the punitive damage award but affirmed the compensatory damage award. *Cf. EEOC v. Wal-Mart Stores, Inc.*, 156 F.3d 989, 992-94 (9th Cir. 1998).

In *Fitzgerald v. Mountain States Tel. and Tel. Co.*, 68 F.3d 1257 (10th Cir. 1995), the Tenth Circuit held that the "imposition of punitive damages in civil rights cases requires "that the discrimination must have been "*malicious, willful, and in gross disregard of [plaintiff's] rights.*" *Id.* at 1263 (emphasis added).

All of the above-cited cases demonstrate the following:

1) The circuit courts have almost uniformly applied a two-tiered standard of liability for an award of punitive damages which is in accord with congressional intent;
2) The circuit courts have formulated the heightened standard in terms that are functionally similar to the "egregious conduct" standard articulated by the court below; and
3) The issue of whether the conduct is sufficiently outrageous or egregious is a question of law for the court to decide.

Accordingly, amicus urges this Court to affirm the lower court's two-tiered system which is in keeping with the intent and structure of the Act.

F. Policy Considerations Support The Congressional Intent to Reserve Punitive Damages To Cases with Egregious Conduct

1. Punitive Damages for Non-egregious Conduct Can Result in Over-deterrence and Quasi-quotas.

It is well-settled that deterrence and punishment are the primary objectives of punitive damages. *See, e.g., BMW v. Gore, supra.* Employers are required to make numerous personnel decisions everyday, such as hirings, promotions, demotions, discipline, layoff/termination, and transfers, to name a few. Almost invariably, such decisions require choices between two or more competing employees or applicants, frequently involving a protected employee.

The adversely affected, protected category employee almost always satisfies the "minimal" criteria to state a *prima facie* claim of discrimination. *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). Employers can, therefore, be hauled into federal court for almost every personnel decision that they make and be forced to justify their decisions. Consider the employer who must layoff one employee among a number of virtually equally qualified minority and non-minority employees. The prospect of incurring punitive damages in multiple lawsuits at a low threshold level of conduct, such as that proposed by the petitioner, will lead many a rational businessperson to consciously or unconsciously lay off the non-minority employee.

Even if the employer articulates a valid reason for laying off the protected employee, the plaintiff can still prevail if he or she demonstrates that the stated reason was a pretext for discrimination. This aspect of the case almost always is submitted to the jury since the ultimate issue to

be resolved is motive. *See, e.g., Ingels v. Thiokol Corp.*, 42 F.3d 616 (10th Cir. 1994). If nothing more is required for a jury to consider in awarding punitive damages, there will be a powerful incentive for employers to make quota-like personnel decisions. This would be particularly true in the "close case." However, this type of voluntary "quota" decisionmaking is not only against public policy,[13] it is illegal and constitutes reverse discrimination, although not generally resulting in a Title VII lawsuit.

Although all discrimination is intolerable, not all discrimination warrants punitive damages. If a plaintiff can obtain punitive damages by establishing pretext, but without any "smoking gun" or showing of egregious conduct on the part of the employer, there can be no deterrent effect in the decisionmaking process through an award of punitive damages. In almost all discrimination cases, unless the decisionmaker is a bigot (in which case there likely are egregious facts warranting punitive damages), the decisionmaker genuinely believes that the personnel decision is justifiable and non-discriminatory.

While that belief may be second-guessed by the jury to the employer's detriment, it must not, absent flagrant or egregious conduct (e.g,, altered personnel records; prior discriminatory conduct by the same supervisor; or other such conduct) give rise to a claim for punitive damages. This is true even if the jury, for whatever reason, believes by the preponderance of the evidence that the employer's rationale for the employment decision was a pretext.[14]

---

[13] *See* President Bush's veto message on S. 2106, 136 Cong. Rec. S16418 (1990).

[14] It is also noteworthy that the EEOC has found no probable cause to believe discrimination has occurred in 60% of all charges filed and completely investigated. That startling high

For this reason, allowing for the jury to award punitive damages in every garden variety discrimination case as the petitioner argues would be contrary to public policy because it would lead to over-deterrence and conscious or unconscious quota-based personnel actions. Since this type of personnel action cannot be deterred if made in good faith, the only purpose served by a punitive damage award is to provide an opportunity of a windfall for the plaintiff.

2. Petitioner's Lower Standard for Imposing Punitive Damages Will Lead to Unnecessary Litigation

Petitioner's argument that punitive damages are available in almost every Title VII case also runs counter to the entire Title VII enforcement scheme which encourages and fosters prompt investigation, settlement, conciliation, and resolution of disputes. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 180-81 (1989). The prospect of receiving large punitive damages awards by participating in the litigation lotto provides a disincentive to a complainant to settle the case out of court. Indeed, EEOC statistics appear to lend support for this observation.

---

rate was approximately the same in 1991. 11 Employment Discrimination Report (BNA) No. 8, at 278 (Aug. 19, 1998) compiled from EEOC's Charge Data System. In stark contrast, between 1991 and 1997, the rate of probable cause findings has ranged between 2.2% - 3.8% of all processed charges. *Id.* This Court should be reticent in providing a non-expert jury with a liberal opportunity to award punitive damages after the expert EEOC agency has determined that the overwhelming majority of charges lack merit.

upon receipt by complaining employee of certain benefits for an additional 6.6% of charges; and approximately 0.8% of the total resolved by conciliation. Thus, almost 16% of the approximate 64,000 cases of alleged discrimination were resolved by the EEOC's administrative process prior to the implementation of the 1991 Civil Rights Act. *See* 11 Employment Discrimination Report (BNA) No. 8, at 278 (Aug. 19, 1998) compiled from EEOC's Charge Data System. This settlement rate was comparable to the overall settlement rates of 16.8% of Title VII charges for the period between 1987-1990. *See* H.R. Rep. No. 40, Pt. 1, at 74, n.70.

The situation by Fiscal Year 1997, however, stands in stark contrast. In that year, EEOC received 106,312 discrimination charges -- 3,992 (3.8%) were resolved by settlement; 3,635 (3.4%) were resolved by withdrawal with benefits; while 1,041 (1.0%) were successfully conciliated. Thus, in 1997, EEOC resolved only 8% of the total cases, approximately 50% of the rate that existed *before* the passage of the Act. *Id.*

Amicus submits that adopting petitioner's arguments that punitive damages should be available, at the discretion of the jury, in essentially every case, would increase the incentive to litigate rather than settle, thereby frustrating the overall legislative intent to encourage non-litigation resolution of charges of discrimination.

3. Because Existing Economic Sanctions Are a Sufficient Deterrent Against Discrimination, Punitive Damages Should Be Reserved for Egregious Discrimination.

In every claim of discrimination, employers may be liable for backpay, front pay, compensatory damages, including emotional distress and pain and suffering, Plaintiff's attorneys' fees[15] and their own attorneys' fees.[16]

Consequently, notwithstanding Amicus the National Employment Lawyers Association (NELA)'s protestations that there are insufficient economic deterrents to discrimination in the absence of punitive damages (*Br.*, at 11-15), the potential cost of the garden variety discrimination claim is significant. Employers who face potential non-punitive damages costs and legal fees of $200,000 - $300,000 in a wrongful promotion claim involving a small salary differential, will not feel free to

---

[15] Plaintiff's attorneys' fees, in individual Title VII claims can be substantial. Indeed, Plaintiff's attorneys in this case sought attorneys' fees and costs in excess of $175,000. *Kolstad*, 912 F. Supp. 13 (D.D.C. 1996). *See also Hennessy v. Penril Datacomm*, 69 F.3d 1344 (7th Cir. 1995) (award of $137,297 in attorneys' fees not abuse of discretion); *Harris v. L & L Wings*, 132 F.3d 978, 984-85 (4th Cir. 1996) ($126,329 in attorneys' fees).

[16] According to a study by the Rand Corporation, defense fees in wrongful discharge litigation averaged $80,000, as of 1988, and was projected to increase 24% annually. H.R. Rep. No. 40, Pt. 1, at 151-52. It is thus reasonable to assume legal fees to defend a discrimination claim now exceed $150,000, with a possible similarly-sized attorneys' fee award for the plaintiff's attorney.

intentionally discriminate simply because of the absence of additional punitive damages. The cost of discrimination to the employer does not need to be increased by a routine award of punitive damages, in the absence of heightened and egregious conduct.[17]

---

[17] The cases cited by Amicus NELA to suggest that punitive damages would not be awarded under the court of appeals "egregious" standard, in fact involved egregious or heightened discrimination. NELA Br. at 12-13. Thus, punitive damages would be (and, in fact, were) awarded in many of those cases under the egregious standard. Thus, in *Harris v. L & L Wings, supra*, the Court affirmed punitive damages in the amount of $150,000 to each of two victims of sexual harassment because the conduct was "egregious." Similarly, in *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995), the Court not only affirmed back pay award of $22,320, as reported in NELA's Brief at 13, but also affirmed an additional $37,000 in compensatory damages, $50,000 in punitive damages, and approximately $100,000 in attorneys' fees. This additional $187,000 in damages and fees was conveniently omitted from the NELA's rendition of the case. Where conduct is egregious, punitive damages are recoverable. Where conduct is not egregious, back pay, compensatory damages, front pay, where applicable; and attorneys' fees are recoverable and they can be substantial. Many other cases cited by NELA also included the award of punitive damages, compensatory damages, and/or attorneys' fees, but were not reflected in NELA's case summaries. NELA Brief at 15. *See, e.g., Kimzey v. Wal Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) ($35,000 compensatory; $350,000 punitive after Court reduction); *Quaratino v. Tiffany & Co.*, 129 F.3d 702 (2d Cir. 1997) ($98,000 punitive; $139,000 attorneys' fees) *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627 (7th Cir. 1996) ($7,325 compensatory; $500,000 punitive reduced to statutory cap).

II. THE SUFFICIENCY OF THE EVIDENCE TO JUSTIFY PUNITIVE DAMAGES IS A QUESTION OF LAW IN THE FIRST INSTANCE

Amicus submits that the sufficiency of the evidence, which may allow for a jury's possible award of punitive damages, is a question of law to be decided by the trial judge, in the first instance, as the court below held. *Kolstad*, 139 F.3d at 965-66. Thus, regardless of what the heightened level of proof is required to sustain a punitive damages award, the district court must have the opportunity to determine whether reasonable jurors could find that a plaintiff has sustained that burden. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986) (summary judgment applies the same standards as a motion for judgment as a matter of law, pursuant to Fed.R.Civ.P. 50(a)).

As this Court noted in *Anderson*, "The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict - 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'" 477 U.S. at 252.[18]

In *Anderson*, the Court held that whether reasonable jurors could determine that "actual malice had been shown with convincing clarity," the governing legal standard in that case, was a question of law for the Court. That

---

[18] Appellate courts review decisions on a motion for judgment as a matter of law *de novo*, using the same standard as the district court. The motion is appropriate when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed.R.Civ.P. 50(a)(1); *Lam v. Curators of the University of Missouri*, 122 F.3d 654, 656 (8th Cir. 1997).

question in turn is dependent upon "the quality and quantity of evidence required by the governing law. . . ." *Id.* at 254. As the Court held: "It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards." *Id.* at 254-55.

The court of appeals correctly determined that the sufficiency of the evidence presented to support the punitive damage claim was a question of law. This decision is supported by the case law in other Circuits. *See, e.g., Tincher v. Wal-Mart Stores, Inc., supra,* 118 F.3d at 1133-34 (7th Cir. 1997) (court finds evidence insufficient for a reasonable finder of fact to determine reckless disregard for evil motive or intent or egregious conduct, although evidence sufficient to submit issue of liability). *Fitzgerald v. Mountain States Tel. & Tel. Co., supra*, 68 F.3d at 1262 ("Whether sufficient evidence exists to support punitive damages is a question of law reviewed *de novo*."); *Karcher v. Emerson Electric Co., supra*, 94 F.3d at 509 (punitive damage claim should not have been submitted to the jury because insufficient evidence.); *Coleman v. Rahija*, 114 F.3d at 787 (8th Cir. 1997); *Wulf v. City of Wichita,* 883 F.2d 842, 867 (10th Cir. 1989) ("While the trier of fact has the discretion to determine the appropriate amount of punitive damages, the sufficiency of the evidence supporting such an award is a legal question.").

Providing the trial judge with the role of gatekeeper on whether the evidence presented rises to the heightened standard also serves as a deterrent to a jury acting out of passion, partiality, or prejudice, against large anonymous

employers who must make personnel decisions everyday.[19] *See, e.g., Honda Motor Co. v. Oberg*, 512 U.S. 415, 425 (1994). Punitive damages in Title VII cases must be reserved to punish and deter egregious and outrageous conduct.

CONCLUSION

For the above reasons and those stated in the respondent's brief, this Court should affirm the judgment of the *en banc* court below.

Respectfully submitted.

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

CROSS WROCK, P.C.
Michael J. Connolly
(Counsel of Record)
David A. Lawrence
400 Renaissance Center
Suite 1900
Detroit, MI 48243
(313) 259-1144

Clifford J. Scharman
1742 N Street, N.W.
Washington,D.C. 20036
(202) 331-0660

Date: January 20, 1999

---

[19] Amicus Association of Trial Lawyers of America's fear that the judge's role regarding punitive damages will deny a plaintiff a right to trial by jury (ATLA Br. at 19-20), misses the point. Although the amount of punitive damages is reserved to the jury, whether there is sufficient evidence to support any award is a question of law under both Fed.R.Civ.P. 50(a) and 50(d). *See, e.g., Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 329-30 (1967); *cf. Hetzel v. Prince William County*, 523 U.S. 208 (1998).